Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling:	)	CC Docket No. 01-92
Lawfulness of Incumbent Local Exchange	)	DA 02-2436
Carrier Wireless Termination Tariffs	)	

REPLY OF THE MONTANA LECS TO THE OPPOSITION OF THE CMRS CARRIERS TO THE MOTION TO DISMISS

Pursuant to Section 1.45(c) of the Commission's Rules, the Montana Local Exchange Carriers ("Montana LECs") respectfully submit this Reply to the Opposition of the CMRS Carriers to the Motion to Dismiss filed by the Montana LECs and concurred in by the Missouri Small Telephone Group.[1] In their Opposition, the CMRS Carriers make a variety of technical and "expediency" arguments, none of which justify their departure from the requirements of the Commission's rule and polices.

1. ***Ex Parte* Rules.**

The Commission spoke clearly when it modified the *ex parte* rules to require that parties filing declaratory ruling petitions seeking to preempt state or local law serve their petition on the state or local governmental agency whose authority would be preempted:

> In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority . . . the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local government that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the

1 The Montana LECs filed their Motion on October 18, 2002, and the CMRS Carriers filed their Opposition on October 31, 2002. The Missouri Small Telephone Group filed its Concurrence on November 1, 2002. The CMRS Carriers filed their Petition on September 6, 2002.

parties are so informed. (47 C.F.R. §1.1206(a), note 1 (emphasis added)).

In its Order adopting this rule, the Commission likewise stated plainly the objective behind the rule – ending the practice in which petitions seeking to preempt the activities of state or local governments were considered without ensuring actual notice to the government agencies affected.[2] Finally, the applicability of the rule to the Petition should be equally clear given the various citations in the Petition to state tariff proceedings involving wireless termination tariffs and the request in the Petition that tariffs involved in these and similar proceedings be declared "unlawful, void and of no effect" on the basis of alleged inconsistency with federal law (Petition at 5-10).

Nonetheless, the CMRS Carriers maintain that they are not seeking to preempt state law, and attempt to draw a technical distinction between (1) invalidating state tariffs approved and/or required to be filed under state law (2) and invalidating state law itself (Opposition at 2-3). But no such distinction exists.

Preemption occurs under the Supremacy Clause of the U.S. Constitution when state law of any kind is declared to be ineffective because the state law conflicts with federal law ("conflict preemption"), compliance with both federal and state law is impossible, a federal statute expressly preempts state law, or another recognized ground for preemption is present.[3]

In this case, state commissions in various states have opened dockets, conducted cases, and entered orders approving and permitting to go into effect tariffs governing wireless

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2 *In the Matter of Amendment of 47 C.F.R. §1.1200 et.seq. Concerning Ex Parte Presentations in Commission Proceedings,* Memorandum Opinion and Order, 14 FCC Rcd 18831, 18838-18840, ¶¶27-29 (released Nov. 9, 1999) (emphasis added) ("Ex Parte Rules Amendment Order"). The CMRS Carriers' citation to the *TSR Wireless* decision (discussed in note 22 below) is misplaced as that case was filed in 1998, before issuance of the *Ex Parte Rules Amendment Order*.

3 *Louisiana Pub.Serv.Commn. v. FCC*, 476 U.S. 355, 368 (1986).

termination services. A number of state orders approving tariffs (or requiring their filing) are collected and attached as Exhibit A to this Reply. The Concurrence of the Missouri Small Telephone Group provides additional detail on the proceedings in Missouri. Pursuant to state statutes that mandate that LECs comply with the terms of their state-approved tariff, LECs are both authorized and required by state law to charge CMRS carriers for their services under the terms set forth in these tariffs.[4] Moreover, following approval, tariffs become state law (the equivalent of a statutory enactment) under the force of the "filed rate doctrine."[5] The CMRS Carriers contend, however, that federal law changes this result and forbids the LECs from charging in accordance with their state tariff as they are permitted to do and in fact must do under state law (Petition at 8-10). Thus, this is a "conflict" preemption case in which the petitioners allege (albeit incorrectly) that federal law forbids what state law authorizes or requires.[6]

In a second line of defense, the CMRS Carriers attempt to argue that they seek relief only against the LECs, not against the state commissions themselves. This argument fails because preemption occurs whenever federal law is declared to trump state law, regardless of whether

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4 See, e.g., Montana Code §§ 69-3-301, 69-3-305; Missouri Revised Statutes §§ 392.220, 392.480; Kansas Statutes Ann. §§ 66-109, 66-117, 66-1,190. In requiring that intrastate telecommunications services be tariffed, state statutes such as these compel the filing of tariffs as well as compliance with filed tariffs.

5 *Bauer v. Southwestern Bell Tel. Co*., 958 S.W.2d 568, 570 (Ct. App. Mo. 1997); *H.J., Inc. v. Northwestern Bell Telephone Co.,* 954 F.2d 485, 494 (8th Cir. 1992) (filed rate doctrine applies to tariffs filed with state agencies); *Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co.,* 83 N.W.2d 147 (1957) (obligation to pay tariffed rate is statutory, not a matter of contract); *Louisville & Nashville R.R. Co. v. Maxwell,* 237 U.S. 94, 97 (1915) (unlawful to charge either more or less than the tariffed rate for a service).

6 The Commission has considered many conflict preemption claims. *See, e.g., American Communications Services, Inc, MCI Telecommunications Corp., Petitions for Expedited Declaratory Rulings Preempting the Arkansas Telecommunications Regulatory Reform Act,* 14 FCC Rcd 21579, ¶46 (1999) (state statute permitted action that federal law forbade).

any specific form of relief (such as an injunction or mandamus) is personally entered against the state officers or state agencies charged with administering the relevant state law.[7] Because the state public utility commissions apply state law to regulated carriers, the drafter of the petition can always choose whether to style the petition as being filed against the regulated carrier or the state regulator, but this drafting choice does not determine whether a petition is a preemption petition. The Commission recognized the need to avoiding opening up the kind of loophole advocated by the CMRS Carriers in clarifying in the *Ex Parte Rules Amendment Order* that "service should be made not only on those states and localities that are subject of the petition but also on those whose actions are identified as warranting preemption."[8]

Certainly, the commenting parties supporting the CMRS Petitioners have no doubt that this is a preemption case:

> "The law is settled that LEC-prepared state tariffs which are inconsistent with federal law (and state commission orders approving such tariffs) are void and enforceable [sic] under the Supremacy Clause of the United State Constitution. . . Under the Supreme Court cases cited above, these state tariff provisions are void, unenforceable, and without effect." (Sprint Comments at 10 and 12)
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> "Commission action to preempt such anti-competitive conduct is not only permissible but required under sections 201 and 332." (CTIA Comments at 12)
>
> "RCA and RTG support the T-Mobile Petition and respectfully ask that the Commission declare the use of wireless termination tariffs unlawful pursuant to Sections 251, 252, and 332 of the Act." (RCA/RTG Comments at 7)

Finally, while the service requirement does not depend on the type of preemption alleged but rather applies to "all preemption petitions,"[9] this is not a case where a federal statute directly

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7 In cases in which preemption is justified, the Commission generally makes a simple declaration that it has preempted state law, without granting any specific or further relief against the state agency. *See, e.g., American Communications Services*, 14 FCC Rcd 21579, ¶52.

8 *Ex Parte Rules Amendment Order*, 14 FCC Rcd 18831, ¶29.

9 *Ex Parte Rules Amendment Order*, 14 FCC Rcd 18831, ¶29.

prohibits a state action or tariff, contrary to the CMRS Carriers' suggestions. No section of the Communications Act provides that state tariffs governing termination of wireless traffic are invalid, and the Commission has recently approved the use of state tariffs to implement a local competition duty under Section 251.[10] Instead, the Petitioners are requesting the Commission to interpret and extrapolate various sections of the Act and previous Commission orders to arrive at a new result that they desire, claiming that this would be an affirmation of existing federal law, despite the presence of several provisions in the 1996 Act reserving significant discretion regarding implementation of the Act to the states.[11] Thus the Petition is anything but a request for a simple reiteration of existing law. It is a complex, far-reaching request for a new interpretation of the Act, which has major significance throughout the country. Under such circumstances, full compliance with the Commission rules is particularly important to assure fair process and an opportunity for all state entities (including those whose staffs have devoted many months to resolving contested tariff cases) to participate.[12]

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10 *See Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 17806, 17826-27, ¶ 36 (2000) (directing changes to state collocation tariffs).

11 See P.L. 104-104, Title VI, § 601(c); 47 U.S.C. §§ 251(d)(3), 261.

12 The CMRS Opposition notes that comments were received herein by several small ILEC associations (CMRS Opposition at 6); however, *no opening comments* were received from any of the 50 state commissions themselves, from other state entities or industry associations, from NARUC or NASUCA, or from many of the hundreds of other ILECs throughout the country. Given the very short comment cycle for this matter, it is very likely that most of these other entities never received actual or constructive notice of the CMRS Petition. Reply comments are not yet fully available on the Commission's website.

2. Failure to Comply with the *Logicall* Decision

The Commission has held that actions regarding the validity of tariff provisions should be brought as formal complaints against individual carriers.[13] Thus, in the *Logicall* case the Commission expressly refrained from deciding whether the self-help provisions in NECA's tariff were lawful, and confined itself to deciding whether a Commission rule (47 C.F.R. §69.601) appointing NECA as a filing agent was consistent with the underlying statute governing filing of federal tariffs (47 U.S.C. Sec. 203.)[14] In the same paragraph in which it refuses to rule on the self-help issue, the Commission states that lawfulness of tariff provisions should be decided in formal complaints "where the affected carriers are mandatory parties."[15]

The case-by-case consideration of fact disputes that is possible in the formal complaint context, but not the declaratory ruling context, is an essential part of the Commission's procedures adopted in the late 1980s for considering requests by CMRS carriers to invalidate tariffs covering termination of wireless-originated calls. In discussing the validity of tariff filings in a 1989 wireless interconnection order, the FCC stated, "[t]he instant proceeding is not the appropriate forum in which to determine whether a particular tariff filing constitutes bad faith in negotiating. Rather, we will review specific factual disputes on a case-by-case basis."[16]

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13 *In the Matter of Communique Telecommunications, Inc. d/b/a Logicall,* 14 FCC Rcd 13635, 13650, ¶27 (1999) (hereinafter, *Logicall).*

14. In their Opposition, the CMRS Carriers characterize *Logicall* as supporting the use of declaratory rulings to decide the validity of tariffs (Opposition at 5). In fact, the issue that the Commission accepted in *Logicall* concerned the authority of NECA to act as an agent for local exchange carriers, a global issue having nothing to do with the substantive tariff provisions themselves.

15 *Logicall*, 14 FCC Rcd 13635, ¶27.

16 *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding)*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, 2371, ¶ 15 (released March 15, 1989).

By deciding in that ruling to review future disputes on a case by case basis, the Commission avoided the risk of deciding issues on a generic basis in advance of having specific facts before it, while protecting the due process right of each LEC (or group of LECs) filing a tariff to defend their tariff based on the individual facts and circumstances pertaining to that tariff. The ripeness-related concern evident in the 1989 wireless interconnection order was another reason for the decision in *Logicall* to refrain from considering the declaratory ruling request.[17] This reasoning applies with particular force in the instant matter, since the CMRS Carriers (despite the 1989 wireless interconnection order) fail to allege specific bad faith actions by the Montana LECs or other various LECs whose tariffs they seek to invalidate, nor do they supply copies of any particular tariff provisions that they wish to challenge.[18] Instead the evidence of bad faith that is in the record consists largely of reports that some CMRS carriers (including those in Montana) are surreptitiously routing calls through RBOC tandems to rural LECs without ever identifying themselves to the rural LEC as being responsible for this traffic.[19]

Finally, the CMRS Carriers' "expediency" arguments regarding the difficulty of bringing the case as a formal complaint and the potential for public participation in formal complaints are overblown. The parties have identified a handful of tariffs at issue, not hundreds. The precedent set in one formal complaint case will govern later cases unless there are factual differences (that might be overlooked in a declaratory ruling proceeding) that could result in a different outcome,

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17 *Logicall* 14 FCC Rcd at 13650.

18 See Petition at 4, note 10 (merely citing the receipt of bills for under $100 each). The Petitioners admit that they "[d]o not challenge any particular provision of any particular ILEC wireless termination tariff." Opposition at 5, note 15.

19 *See, e.g. NTCA* Comments at 6, Montana LEC Comments at 4, Rural ILEC (South Dakota) Opposition at 3.

such as the existence of bad-faith actions on part of either the LEC or the CMRS carrier. Moreover, the Commission can and in recent years has taken steps to ensure the opportunity for broad public participation in formal complaints, through permitting the filing of amicus curiae briefs and issuing public notices inviting comments.[20] The Commission has also successfully used case consolidation procedures to process related formal complaints involving larger numbers of parties and tariffs than are involved in this proceeding.[21] In short, there is no reason to depart from the Commission's general rule that requests to invalidate tariffs should be filed as formal complaints rather than as declaratory ruling requests.

3. Interference with Ongoing and Recently Concluded State Proceedings and Invoices Already Issued Under Approved State Tariffs

The CMRS Carriers do not deny that they are asking the Commission to step in in a manner that could potentially interfere with the work done by the state commissions and the courts in resolving various cases involving wireless-originated traffic. Rather the CMRS carriers attempt to argue the merits of their case, citing assorted rulings concerning such matters as LEC-originated rather than wireless-originated traffic[22] and attempts by carriers to trump an existing

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20 *See, e.g., AT&T v. Ameritech Corp*., 13 FCC Rcd 21438, ¶66 (1998) (amicus curiae briefs accepted); *Public Notice, Ex Parte Procedures Established for Formal Complaint Filed by MCI Telecommunications Corporation Against Bell Atlantic Corporation*, 12 FCC Rcd 19712 (1997) (inviting the submission of information by interested persons on a permit-but-disclose basis "[b]ecause the AT&T complaint proceeding also raises significant and complex legal and policy issues, and because a broader exchange of views on these issues would likewise serve the public interest.")

21 *See, e.g., In the Matter of Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period*, 8 FCC Rcd 1876, ¶1, note 1 and Appendix A (1993).

22 *See In the Matters of TSR Wireless, Inc*., 15 FCC Rcd 11166, ¶2 (2002), *affd*., 252 F.3d 462 (D.C. Cir. 2001) (applicability of 47 C.F.R. §51.703 to LEC charges to paging carriers for delivering LEC-originated calls).

interconnection agreement by subsequently filing a tariff.[23] The Montana LECs and many other parties have refuted the contentions of the CMRS Carriers on the merits in comments and reply comments, and will not repeat the key arguments here. The point here is that principles of abstension, comity, and respect for earlier-filed proceedings all strongly weigh against entertaining the instant declaratory ruling request.[24] Nothing in the Opposition rebuts that point.

CONCLUSION

The CMRS Carriers have failed to justify their departure from the Commission's rules governing the filing of declaratory ruling petitions and the petition should therefore be dismissed.

Respectfully submitted

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23 *See Bell Atlantic v. Global NAPS*, 15 FCC Rcd 12946 (1996), *affd*. 247 F.2d 252 (D.C. Cir. 2001). The instant case by contrast involves the use of a tariff to govern service in the absence of an approved interconnection agreement.

24 The Commission is therefore free to decide that a declaratory ruling is not appropriate in response to the Petition filed by the CMRS carriers herein. *See e.g. Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973).

CERTIFICATE OF SERVICE

I, Tracy Dietrich, hereby certify that on November 7, 2002, I caused copies of the foregoing Reply electronically filed with the FCC to be served on the following via first-class U.S. Mail:

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